IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1532

PETER CARBONE,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JACOBS, JACOBS & GRUDBERG, P.C.
350 Orange Street, P.O. Box 606
New Haven, Connecticut 06503
Attorneys for Petitioner

IRA B. GRUDBERG
Of Counsel

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Petitioner Peter Carbone prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Connecticut announced January 18, 1977.

Opinions Below

The opinions of the Supreme Court of Connecticut are reported at Vols. XXXVI, No. 37 CONN. L.J. 5 (1975) and XXXVIII, No. 29 CONN. L.J. 8 (1977). They are reproduced in full in the appendix of the petition of James Carbone (28a, 57a).* James Carbone was tried with peti-
76-1444.
tioner and his petition is a companion to this one. No.

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* References in this petition to the numbered pages of an appendix in all instances refer to the appendix to the petition of James Carbone (a). That appendix is adopted by this petitioner.

Jurisdiction

The Judgment of the Supreme Court of Connecticut was entered on January 18, 1977. A timely motion for reargument was denied on February 1, 1977, the effective date of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Did a search for business records, supposedly justified by "consent", violate the defendant's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States, when that "consent" was mere acquiescence to a request by a search party of eight persons who had already been conducting an exhaustive search of the premises for more than an hour based upon a warrant obtained solely upon facts eight months stale?

2. Did the court below deny to petitioner his right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States when it refused to allow defendant to demonstrate bias and interest on the part of the principal prosecution witnesses by showing the sham invocation of their Fifth Amendment privilege against self-incrimination? Did the state court improperly sacrifice petitioner's Sixth Amendment rights in favor of the witnesses' Fifth Amendment privilege?

3. Did the conviction of petitioner on each of four duplicitous counts (the State being allowed to proceed on each count with both of the, mutually exclusive, offenses of larceny and receiving stolen goods) violate his rights under the Sixth Amendment to be properly informed of the nature of the charges against him, when his repeated

requests to have the State define the true nature of the charges, or choose between the theories of prosecution were just as consistently rejected?

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amend. IV, V, VI and XIV.

§53-63a Conn. Gen. Stat. (1958 Rev.)
§53-65 Conn. Gen. Stat. (1958 Rev.)

Statement

The Facts Material to the Federal Questions

Petitioner, and his brother James Carbone were charged, tried and convicted upon substituted informations each setting forth four counts of larceny allegedly committed on distinct dates in January and February, 1971 (28a, 51a).

In May of 1971, management at Carpenter Technology Corporation discovered an apparent large inventory shortage of copper and nickel at its plant in Bridgeport, Connecticut. On July 14, 1971, Albert Edwards and Russell Scofield, both employees of Carpenter, were apprehended in the act of stealing nickel from the plant (44a).

By early August, both Edwards and Scofield were "cooperating" with the Bridgeport police and with persons connected with Carpenter and its insurance carrier. At that time, each of the thieves gave statements to Detective Cafferty of the Bridgeport Police Department claiming that on four different dates in January and February of 1971, they had stolen from Carpenter quantities of nickel, iron and copper and had sold and delivered the metals to peti-

tioner and his brother at Fairfield Scrap Iron and Metal Company owned by petitioner.

On September 2, 1971, approximately seven months after the alleged thefts, Detective Cafferty and Robert Magee, an employee of Carpenter, obtained a state search and seizure warrant authorizing a search of Fairfield Scrap for the alleged stolen metals and two chains and a tarpaulin used in handling the metals, none of which items were found on the premises (7a, 32a, 54a). No authority to search for or seize books and records was sought or obtained.

The application for, and affidavit in support of, the search warrant was based solely upon Cafferty's representations to the Court that Edwards and Scofield had been arrested in the course of an attempted theft in July and that each of the thieves had sworn to him that they had made four deliveries of copper and nickel to Fairfield Scrap back in January and February (1a-3a).

At trial, the State's case rested almost entirely upon the testimony and credibility of the two thieves. The State made much, however, of a receipt taken from the Fairfield Scrap records bearing the name "John Parks" which Scofield claimed he had signed at the time of making one of the alleged deliveries of stolen metal. The search for and seizure of that slip forms the basis of the Fourth Amendment claim here.

Upon obtaining the warrant, Detective Cafferty and Magee returned to Carpenter where they began to amass a large search party. Cafferty also invited Henry Popowski, Foreman of the Melt Shop at Carpenter to help identify

questioned items. Alfred Constantino, a special investigator for Carpenter's insurance carrier was brought along for no apparent reason. Another Bridgeport policeman, two Fairfield officers and an F.B.I. agent rounded out the party. It was that formidable group which descended en masse, in four vehicles, on Fairfield Scrap about 2:00 P.M. on September 2, 1971 (30a, 52a-54a).

All of the persons in the search party, both police officers and civilians, were dressed in civilian clothes (30a, 53a). When the search party arrived at Fairfield Scrap, Sergeant Targowski, the senior Fairfield Police Officer, sought out someone in charge and not finding James Carbone, the proprietor, he displayed the warrant to petitioner Peter Carbone and advised him of their purpose on the premises (31a, 53a). All eight of the search party, including the civilians, fanned out around the premises for purposes of the search (32a, 54a). The officers in charge, Cafferty and Targowski, were both aware of the fact that the warrant did not authorize a search for any books and papers of Fairfield Scrap (33a, 55a). On the way to the premises before the search, Detective Cafferty had a conversation with the insurance investigator, Constantino, concerning a search for slips and records with the thieves' names on them, and Cafferty told him not to search for anything, but if they happened to see anything with those names on it, to let him know (30a, 53a).

Shortly after the search began, James Carbone arrived, as did his son and employee, Frank Carbone. After the search party had been on the premises for an hour or so, Constantino asked Frank, in James' presence, if it would be alright to search through their sales receipts (32a, 54a). Before that time Detective Cafferty had given both James

and Peter Carbone their "Miranda" warnings, but at no time had he ever warned them that they need not allow any search for items not named in the warrant, nor did he specifically tell anyone just what was in the warrant (31a-33a, 54a-55a). Petitioner never took the warrant and read it, and there was no indication that anyone read any portion of the warrant to him (31a, 53a). Although Detective Cafferty took no part in the Constantino-Carbone conversation, he was present and within earshot when the request was made of Frank Carbone (32a, 54a). Detective Cafferty remained silent even though he knew a very possible result of Constantino's question was that a search would take place; Detective Cafferty did not tell any of the Carbones who Constantino was prior to the request for sales receipts and records (32a, 54a).

Frank Carbone got the receipts in response to Constantino's request; the two civilians, Constantino and Popowski, looked through them, and Popowski found the "John Parks" slip (32a-33a, 54a). Petitioner made no objection to Frank getting the sales receipts (32a, 54a). Prior to that search, neither Popowski nor Constantino had had any conversation with the Carbones nor had they informed them that they were civilians and not any "official" part of the search party. Neither Constantino nor Popowski had ever asked any permission to come on the premises (32a, 54a). The Carbones were not asked to sign a consent to search form, although the Bridgeport police have such forms, nor were they ever advised by anyone that the seizure of the slip was beyond the scope of the warrant (33a, 55a). When they left three and a half hours later, the search party had found nothing named in the warrant, but had taken the "John Parks" receipt which was later admitted at trial (34a).

Petitioner and his brother each maintained his innocence and both testified to that effect at the trial, which involved deeply disputed issues of fact. As noted by the court below, the State's case "hinged in the main part upon the credibility of the witnesses Scofield and Edwards" (34a).

During the cross-examination of the two thieves, petitioner and the co-defendant sought to show that both Scofield and Edwards had, in earlier depositions in a civil action arising out of the same alleged facts, pleaded a Fifth Amendment privilege to avoid giving any information or testimony to the defendants in the criminal action (10a). Long prior to the time of those depositions, each of them had given to the police lengthy sworn statements which had hopelessly incriminated them (10a-11a). Scofield, in fact, had already pleaded guilty and was waiting sentence on charges arising out of the subject matter of his proposed deposition testimony (11a). At all times, it was clearly Edwards' intention also to plead guilty and testify against petitioner and his brother. The inquiry into what defendants felt was a sham invocation of the privilege was offered on the issue of the credibility of the two thieves, to show interest in the prosecution and bias against the defendants (12a). The trial court sustained the prosecution objection to such offers, and both defendants excepted (12a).

The jury returned verdicts of "guilty as charged" on each of the four counts (29a); both defendants were sentenced to terms of incarceration of not less than three years and not more than nine years in the State's prison.

The Raising Of The Federal Questions

Both defendants raised the Fourth Amendment issues in a pre-trial Motion To Suppress Evidence. It was petitioner's claim that the warrant had been issued without probable cause, based upon facts which were far too stale to establish such cause. There was an evidentiary hearing on the issue of consent. The motion was denied, at the pre-trial stage, by Honorable Irving Levine of the Connecticut Superior Court. At trial the presiding judge overruled petitioners' objections to the "John Parks" slip, without further independent consideration, relying upon Judge Levine's earlier ruling on the constitutional question.

On the first appeal to the Connecticut Supreme Court, that court vacated the convictions on the search issue, holding that, as the civilians were on the premises at the behest and under the direction of the police, their search through the Fairfield Scrap records was subject to Fourth Amendment standards. Concerning the warrant, the Court held that, based upon the affidavit, it was "unable to find that there is a substantial basis for the issuing judge's conclusion that probable cause presently existed" and that there "clearly was merit to the claim that the warrant was stale". (39a, 40a) The case was returned for a reassessment of the consent issue in light of the illegal warrant. Noting that "it is obvious that this error [on the consent issue] was prejudicial to the defendants", the court found it totally unnecessary even to consider the non-search assignments of error.

Upon remand, with absolutely no new evidence having been heard, the lower court found that the warrant was *not* stale, and stood by its earlier finding that there had been free and voluntary consent to the search. The second

time back to the Connecticut Supreme Court, *this time subsequent* to this Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), that court had no difficulty finding that the warrant was sufficiently "fresh" and that there had been effective consent.

The attempt to confront Scofield and Edwards concerning their invocation of the Fifth Amendment privilege was raised, as set forth above, in the course of cross examination of those witnesses. Upon objection by the State, petitioner offered to prove the alleged bad faith assertion of the privilege as bearing upon the credibility of those two crucial witnesses. Proper exception was taken to the court's sustaining of that objection. In denying petitioners' claims of prejudice thereby, the Connecticut Supreme Court held that "[t]he prior invocation of a constitutional privilege can be motivated by so many factors other than bias that the court was within its discretion in excluding cross-examination on this matter as irrelevant." (68a)

The duplicity issue, and the failure to apprise the petitioner of the specific charges he was to defend, was raised in many ways. In his Motion for Bill of Particulars petitioner asked the court to make the State specify whether it was accusing him of being a principal thief or receiver of stolen goods. That request was denied. (8a) After the State rested, defendants moved to dismiss each count of the information as duplicitous: denied. (12a) A companion motion filed at the same time asking for the alternative relief of making the State then elect, for each count, whether to proceed either on a straight larceny, or receiving, theory was also denied. (13a)

After all the evidence was in, petitioner requested that the court submit only one theory to the jury rather than

both. (14a) The trial judge refused to charge the jurors that way, instead instructing them that they could convict on *either* theory for each count, but that they could not have two guilty verdicts within any single count. (15a) Counsel excepted to that charge. (27a) The Connecticut Supreme Court dealt with the matter by affirming simply *because the various motions were made,* observing that "experienced counsel" therefore was obviously aware of the fact that, indeed, within each count the State "was charging *both* and would endeavor to prove *either.*" One can only speculate what the reaction of the court below might have been if defendants had *not* complained that they had not been afforded proper notice of the charges against them.

REASONS FOR GRANTING THE WRIT

1. The Court below ignored established Fourth Amendment principles of this Court on the issues of staleness of the warrant and the alleged consent for the search. This Court, having made federal habeas corpus relief unavailable in *Stone v. Powell,* should exercise care so that state courts do not ignore the constitutional imperative set forth in the Fourth Amendment.

2. This Court has never decided whether an accused's Sixth Amendment right to confront and cross-examine a witness against him must bow to the witness' Fifth Amendment privilege. The resolution of that issue by the court below, adversely to petitioner, flies in the face of applicable principles enunciated by this court in *Davis v. Alaska,* 415 U.S. 308 (1974) and other cases.

3. This court has never decided that a prosecution based upon duplicitous charges, not truly informing a defendant

of the nature of the charges against him, is not violative of the Sixth Amendment; the maintenance of this prosecution by means of duplicitous counts, over repeated objections and in the face of continual attempts by petitioner to become informed of the nature of the charges against him, violates established principles of this Court concerning fundamental fairness.

THE SEARCH

We humbly submit to this Court that the case at bar presents a very important question—in many ways much broader than the specific Fourth Amendment "staleness" and "consent" issues raised. In 1975, the Supreme Court of Connecticut, in weighing whether the affidavit of September 2, 1971 presented sufficient facts under oath to justify a search of defendants' premises on that date, stated that,

> "[t]he unsupported observation by Detective Cafferty that the items are 'reported to be on [sic] the current custody and care of the premises' is insufficient to establish continuity, and, thus, we are unable to find that there is substantial basis for the issuing judge's conclusion that probable cause presently existed." (39a)

The court's narrow holding concerning the sufficiency of the affidavit was that there "clearly was merit to the claim that the warrant was stale" and added that the stale warrant and resultant lack of legal presence at Fairfield Scrap should have been considered on the question of alleged consent to the search. (40a)

In 1975, the court below did not stop with finding the warrant stale. It passed on to speak to "the ultimate de-

termination whether, upon all the circumstances, the consent herein can be deemed to have been voluntarily given." (42a) In commenting on that "ultimate determination" the court significantly cited the language of this Court that

> "[t]he Fourth . . . . . Amendment require[s] that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, *no matter how subtly the coercion were applied,* the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." (Emphasis Added)
>
> *Schneckloth vs. Bustamonte,* 412 U.S. 218, 228 (1974) (42a)

The 1975 reversal of the conviction on the search issue was an emphatic one, the court declining even to bother with the non-search issues "since it is obvious from the record that this error [on the Motion to Suppress Evidence] was prejudicial to the defendants . . . " (42a) Immediately before announcing its reversal, the Connecticut Court again searched out some very interesting language from *Schneckloth.*

> "[I]f under all the circumstances it has appeared that consent was not given voluntarily—that it was coerced by threats or force, *or granted only in submission to a claim of lawful authority*—then we have found the consent invalid and the search unreasonable." (Emphasis Added) Id. at 233 (42a)

By 1977, all had changed. By then, on exactly the same affidavit—the exact same "evidence"—the court below held that, indeed, probable cause *had existed* for issuance of

the warrant. (59a) Notwithstanding its earlier 1975 citations to the "subtle coercion" obviously inherent in the fact that a search party of eight persons were spending hours searching premises for which they had announced legal authority in the from of a warrant or to its 1975 reference to "consent . . . granted only in submission to a claim of lawful authority"—in 1977, somehow, "the determination . . . that consent was voluntary was reasonable considering all the evidence together with the reasonable inferences which could be drawn from it." (60a)

Between 1975 and 1977, there was no new evidence offered, or heard, on the issue of consent. However, it may be of some importance that, in 1976, this Court, in *Stone vs. Powell, supra,* closed the door of the United States District Court for the District of Connecticut to this petitioner and his brother. We ask that, in view of the now-closed door, and the extraordinary about-face of the court below, this Court examine most carefully the validity of the holding below.

In its finding of probable cause, the trial court engaged in the grossest kind of speculation that a tarpaulin and a couple of chains allegedly wrapped around some stolen metal, claimed to have been delivered to the Fairfield Scrap premises, would be at those premises seven months later. There was not a shred of evidence in the affidavit, or before the court in any other form, supporting the finding that the chains and tarp "were of such a nature that use of them could be made in the premises"—or supporting its conclusion that "they would have remained there inasmuch as it would be natural to keep them where there was *constant need for them.*" (Emphasis Added) (46a) There was no evidence presented to the issuing or re-

viewing courts that Fairfield Scrap had *any* need for those items, or that the thieves had ever stated that it was anyone's alleged intention ever to remove the handling materials from the stolen metals.

Although the trial court attempted weakly to invoke what it called a "continuous course of criminal conduct" to justify a finding of probable cause, the claimed offenses simply do not fall into that category. This case did not involve an everyday "business" like gambling, prostitution, or narcotics—only four alleged discrete larcenies seven and eight months before the search. The fact that Scofield and Edwards were caught in an attempted theft seven weeks before the search, relied upon also by Judge Levine, adds nothing, as there was nothing in the affidavit to the effect that the thieves intended to deliver that material to the defendants. Such an "omission" was of course not inadvertent on the part of the State; neither Scofield nor Edwards, at trial, ever claimed to have seen defendants or to have been at the Fairfield Scrap premises after February although, they testified, they continued to steal metal for "delivery" to others.

Absolutely nothing in the affidavit submitted, from whence must come the probable cause, *Aguilar vs. Texas*, 378 U.S. 108, 112 (1964), supports the conclusions of the courts below. Those conclusions can only be reached by resort to the kind of rank conjecture and speculation that this Court has specifically forbidden. *Sgro vs. United States*, 278 U.S. 206, 211 (1932)

Even if we were to assume that the warrant were validly issued, and the police party legally on the premises that day, to search for metals, chains and tarpaulin, the search through the business records and seizure of the slip was

nevertheless illegal. The finding by the trial court, affirmed by the Connecticut Supreme Court, of "free and voluntary" consent simply cannot stand.

We must examine the situation as seen by the Carbones that September afternoon in 1971. A large party of officers and unidentified auxiliaries had arrived, in possession of a warrant and announcing their intention to search the premises, which was accomplished over a three and one half or four hour period. They fanned out in all directions and virtually took control of the premises. Although Peter and James Carbone were warned of their "rights" as to the Miranda warnings, not a thing was explained to them concerning the scope of search authorized by the warrant, and of their right to say "no" to any attempted expansion of that search. While the trial court correctly pointed out that *Schneckloth* does not automatically void consent given without a warning or explanation of the right to resist, the failure to give such a warning is a factor which must be considered. That factor, in this case, is crucial because the officers *did display* a warrant, clearly implying their right to search and the duty upon the Carbones to submit to that authority. Under such circumstances, almost any permission granted without an understanding that the warrant did *not* authorize a search for the slips would be "acquiescence" rather than voluntary consent.

Finally, we submit that there is no way to find true consent here in the face of the decision of this Court in *Bumper v. North Carolina*, 391 U.S. 543 (1968), where the Court voided a supposed "consent search" on facts practically indistinguishable from those presented here.

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden

> of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant or fails to show that there was, in fact, any warrant at all.
>
> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."
>
> 391 U.S. at 548-550

The court below distinguished *Bumper* on the ground that, in that case, there had been a simple announcement of a warrant, whereas in the case at bar "the warrant was read to Peter and shown to James." (59a, 60a) Since Peter was not even present when the "move was made" for the records, what was read to him was totally irrelevant on the issue of consent, and there is not a bit of evidence that James either read the four page warrant or understood the extremely technical limitations concerning what the search party could not search for. The further reliance by the court below on the fact that Constantino knew he could not search through records without consent, (60a), is patently absurd. The issue is not whether Cafferty's "helper" knew he had to obtain consent by hook or crook—the question is whether James Carbone's "consent" was truly voluntary, or merely the normal and expected acqui-

escence to the overpowering and continuing police presence, based upon a claim of authority, the warrant.

The trial court attempted to distinguish *Bumper* as a case only applicable to "elderly widows" and not to "adult businessmen." There is, however, absolutely no indication in the above cited language of this Court, or in the opinion generally, which supports such a drastic limitation. Further, there is no indication that businessmen as a group are any better versed or more knowledgeable about the intricacies of search and seizure law. Finally, there is not a shred of evidence that any of the Carbones either had had past experience with the police or with search parties, or that they had been whiling away their leisure hours reading search and seizure literature or taking courses on the Fourth Amendment. The situation here was just as "instinct with coercion" as in *Bumper*. There was no true consent. The search violated established Fourth Amendment principles.

As this court recognized in *Mapp v. Ohio,* 367 U.S. 643 (1961), not all states had felt that the Fourth Amendment protections justified the invocation of the exclusionary rule. Connecticut was among those jurisdictions which had left enforcement of the Fourth Amendment to civil actions and the like. *State v. Carol,* 120 Conn. 573 (1935) It is a historical fact that not all state tribunals have been uniformly scrupulous in recognizing and vindicating those protections and guaranties set forth in the Bill of Rights to the Constitution of the United States. *Palko v. Connecticut,* 302 U.S. 319 (1937); *Cantwell v. Connecticut,* 310 U.S. 296 (1939); *Rogers v. Richmond,* 365 U.S. 534 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Darwin v. Connecticut,* 391 U.S. 346

(1968); *Boddie v. Connecticut*, 401 U.S. 371 (1971). With the tremendous volume of work annually presented to this Court, we realize it is difficult for the Court to accept more than a tiny fraction of the "garden variety" search and seizure cases tendered, especially where, as here, a case virtually identical on its facts has already been decided at this level. *Bumper v. North Carolina, supra.* Since, however, (1) the Court has closed the door to habeas corpus relief, (2) the decision below rather clearly ignores principles established by this Court and (3) the case was hotly disputed on the facts, resulting in substantial incarceration for two individuals with no prior criminal involvement of any kind, we suggest to the Court that the exercise of its certiorari jurisdiction here is fully warranted.

Confrontation

The two thieves were the principal state's witnesses; without them, simply, the State had no case. Within three weeks of their arrest in mid-July each had given full statements to the authorities. Both witnesses acted after fully consulting with counsel, and the statements were given voluntarily with the desire of cooperating fully. Later, both Scofield and Edwards gave further statements as part of further preparation of the prosecution against the Carbones. At all times, they intended to tell the police and court as much as they wanted to know; Scofield stated it was *always* his intention to plead guilty, cooperate with the police and testify against the defendants. Indeed, he had in fact *already* pleaded guilty by the time he was subpoenaed to testify at the civil deposition. (11a).

During cross-examination of Scofield and Edwards, the defense proffered questions calculated to bring out the

fact that each had pleaded the Fifth Amendment privilege in response to all questions asked in the course of depositions taken in the civil action brought by Carpenter Steel against the Carbones, Scofield and Edwards. (10a, 68a)

Defendants claimed that the witnesses' invocation of the privilege, long after they had decided to cooperate with the police and plead guilty, was in bad faith. The defense argued that it showed a desire to "help" the prosecution and to prevent the defendants from learning, in advance, what their testimony would be at trial. It was offered to show an interest on the part of both Scofield and Edwards in the outcome of the criminal trial, and to show bias against the defendants. If such inferences were not overpowering ones, they were at least permissible, intelligent conclusions that the jury might have drawn, and used in weighing the credibility of Scofield and Edwards. The inability of defendants to explore the credibility of the two crucial State's witnesses effectively denied them their Sixth Amendment right to confront witnesses against them.

The only case relied on by the Court below to support its denial of petitioner's right to cross-examine the State's witnesses is *Grunewald v. United States,* 353 U.S. 391 (1957). But *Grunewald,* held it prejudicial error to allow the Government to cross-examine the defendant about his prior invocation of the privilege before the grand jury since the assertion of the privilege was consistent with the defendant's innocence and such cross-examination would be highly prejudicial to the defendant. *Grunewald* barred cross-examination to insure fairness to the defendant and, therefore, is wholly inapposite. Moreover the witnesses in the pending case had admitted their guilt and could not have been prejudiced by the questioning.

An individual under compulsion to make disclosure as a witness who revealed information instead of claiming the privilege has been held to lose the benefit of the privilege. *United States v. Kodel,* 397 U.S. 1, 7-10 (1970). More recently, in *Garner v. United States,* — U.S. —, 47 L.Ed.2d 366 (1976), this Court held that a taxpayer's incriminating disclosures on his tax returns instead of claiming the privilege, as he had a right to do, could subsequently be used against him in a federal criminal prosecution.

This Court, moreover, has consistently disallowed refusals to testify when there is no "real" and substantial "hazard of incrimination," see *Marchetti v. United States,* 390 U.S. 39, 48, 53 (1968), and has held that a witness who volunteered incriminating answers to the grand jury could not thereafter invoke the privilege as to details which "would not further incriminate." *Rogers v. United States,* 340 U.S. 367, 373 (1950). See also *Ellis v. United States,* 416 F.2d 791, 800 (D.C. Cir. 1969)

A primary interest secured by the confrontation clause is the right of cross-examination which traditionally has allowed the cross-examiner "to impeach, i.e. discredit, the witness." *Davis v. Alaska,* 415 U.S. 308 (1974). In *Davis* this Court held:

> "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." 415 U.S. at 320.

Prior case law lends no support for a claim that the witnesses' Fifth Amendment rights should have been superior to the defendants' right to "effective cross-examination for

bias of an adverse witness." Id. To the contrary, it has been held that the fact of invocation of the privilege may be admissible even without the added factor, here present, of these defendants' Sixth Amendment rights.

In *Raffel v. United States,* 271 U.S. 494 (1926), the defendant had, in an earlier trial on the same indictment, relied upon his privilege and had not taken the stand. In the second trial, he did testify. The government sought, successfully at trial, to bring out the fact that at the first trial the defendant had not testified. On appeal, this Court held that such cross-examination was proper. The Court stated that once having taken the stand, he had irrevocably waived any privilege; the earlier assertion of the privilege, if in any way logically relevant and competent within the scope of the rules of cross-examination, was admissible to test his credibility. The Court, very broadly, indicated in the very last sentence of the opinion, "We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that which the defendant reserves it by refusing to testify." 271 U.S. 494 at 499.

The Supreme Court of Michigan, some years later, in *People* v. *McCrea,* 303 Mich. 213, 6 N.W. 2d. 489 (1942), reached the same result. There, McCrea had refused to testify before the Grand Jury that had indicted him, and the State, in cross-examination of his trial testimony, was allowed to bring out that fact. If such cross-examination is permissible where it could be so highly prejudicial *to the defendant himself,* surely it is admissible where, as here, it is not an accused being examined.

Petitioner seeks review by this Court to resolve the tension between his right of confrontation under the Sixth

Amendment and the privilege against self-incrimination of the Fifth Amendment invoked by the State's chief witnesses in prior proceedings. Petitioner submits that, under the circumstances of this case, his right to cross-examine the witnesses against him in order to impeach their credibility as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States should have prevailed.

NOTICE OF THE CHARGES

The reasons why this Court should issue the writ on this issue have been fully and persuasively set forth by the petitioner in the companion case, *James Carbone v. State of Connecticut,* Docket No. 76-1444, at pages 10 through 16 of his Petition. This petitioner respectfully adopts the reasons therein set forth and hereby incorporates that portion of said Petition herein.

CONCLUSION

For the reasons set forth above, this Court should issue its writ of certiorari to review the judgment of the court below. We respectfully ask the Court to do so.

Respectfully submitted,

By .....

IRA B. GRUDBERG

Jacobs, Jacobs & Grudberg, P. C.
350 Orange Street
P. O. Box 606
New Haven, Connecticut 06503

Attorneys for Petitioner

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